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No. 09-____

IN THE
Supreme Court of the United States

STEPHEN MICHAEL WEST,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether trial counsel's failure to investigate and present evidence at sentencing of the defendant's severe childhood abuse can be dismissed on the basis of unsupported conjecture by the Court of Appeals that the jury might have concluded that "violence begets violence" and might have "despised [the defendant] and sentenced him to death with greater zeal," leaving the court able only to "speculate" what effect the evidence actually would have had, and thereby foreclosing a conclusion that the defendant was prejudiced by counsel's failure to present the evidence.

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PETITION FOR A WRIT OF CERTIORARI

Stephen Michael West ("West") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The December 18, 2008 divided opinion of the Court of Appeals is reported at 550 F.3d 542 and reprinted in the appendix to this petition ("Pet. App.") at 1a-58a. The District Court's September 30, 2004 memorandum opinion is unreported and reprinted at Pet. App. 59a-363a.

JURISDICTION

The Court of Appeals entered its judgment on December 18, 2008, and denied a timely petition for rehearing and rehearing en banc on May 20, 2009. Pet. App. 428a-429a. On July 22, 2009, this Court granted an application to extend the time to file a petition for a writ of certiorari to October 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a criminal defendant's constitutional right to the effective assistance of counsel under the Sixth Amendment, which provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

A. Introduction

The sentencing jury in this capital case never heard substantial evidence that petitioner Stephen West, born inside a mental hospital, was subjected to severe abuse from the time he was a baby – that his mother would pick him up by his feet and sling him against the wall, leaving him bleeding and throwing up, and that she stated she would kill him if she could get away with it. Despite obvious red flags, trial counsel failed to investigate West's abusive childhood and therefore could not present evidence of this kind at sentencing. On habeas corpus review, a divided panel of the Sixth Circuit dismissed the significance of this evidence. It openly recognized that "[t]he jury might have believed that the abuse made West the kind of person who was psychologically unable to confront or disobey strong, threatening people such as Martin [West's co-defendant]. The jury might have pitied West and chosen to spare his life." Pet. App. 25a-26a. However, without any support, the majority also conjured another possibility: "[T]he very same evidence may have had the opposite effect on the jury. They might have believed that violence begets violence and that West's past abuse made him the kind of person who could have raped and tortured a fifteen year-old girl. They might have despised West and sentenced him to death with greater zeal." Pet. App. 26a.

It is difficult to imagine how a jury could have "despised" West and "sentenced him to death with greater zeal" because he was repeatedly beaten as a

child, or concluded that such "violence begets violence" and therefore justified West's execution. Pet. App. 26a. But having decided that the jury "might have" reacted in such a way to this evidence, the majority concluded that it could not find "prejudice" resulting from counsel's failure to investigate and present the evidence. It held that "[i]t is not enough for this court to speculate that the jury would have chosen the former path" (and "pitied" West rather than "despised" him), and therefore "we cannot conclude that there was a reasonable probability that the jury would have chosen to spare West's life." *Id.*

The decision of the Court of Appeals is grossly wrong, but it also is more broadly significant. It is wrong because there is no reasonable basis for the majority's conjecture that this evidence could have been perceived as aggravating, and because the "prejudice" component of *Strickland v. Washington*, 466 U.S. 668 (1984), does not require more than what the Sixth Circuit majority explicitly recognized: that "[t]he jury might have pitied West and chosen to spare his life." Pet. App. 26a. Indeed, West was not even required to show that "the jury" in its entirety would have been so moved; it is sufficient that if this evidence had been placed "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

But the decision also is more broadly significant. It reflects a widening divergence regarding how courts view a failure to present mitigation evidence,

and particularly evidence that conceivably might be viewed by some jurors in a negative light – a characterization that is possible for virtually *any* evidence (including, according to the Sixth Circuit here, being severely abused as a child). According to the panel, evidence that "might" have differing effects upon the jury leaves the court forced to "speculate" whether the jury would have viewed the evidence favorably or unfavorably, and therefore forecloses any finding of "prejudice" from counsel's failure to investigate and present the evidence. Pet. App. 26a. Other courts have expressed a similar view. *See, e.g.*, *Bowie v. Branker*, 512 F.3d 112, 121 (4th Cir.), *cert. denied*, 128 S. Ct. 2972 (2008) ("mitigating evidence . . . should be discounted, under our precedent," if "double-edged"); *Harris v. Cockrell*, 313 F.3d 238, 244 (5th Cir. 2002) ("The failure to present such double-edged evidence is not prejudicial."); *Willacy v. State*, 967 So. 2d 131, 144 (Fla. 2007) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword."), *cert. denied*, 128 S. Ct. 1665 (2008).

But many other courts, discussed below, view mitigation evidence very differently, and also do not dismiss the potential significance of mitigation evidence simply because it might be characterized as "double-edged." These courts recognize, consistent with precedents of this Court, that mitigation evidence generally *explains* violence that already has been found, rather than negating the possibility that such violence might occur.

As a result of these differing approaches, the death penalty presently is not being administered in an even-handed manner among the states that allow it. In some states and circuits, counsel's failure to investigate and present mitigation evidence is readily discounted because that evidence might have some aggravating edge (taken to the extreme here with the suggestion that evidence of being slammed into a wall as a child perhaps simply "begets violence"). In other states and circuits, counsel's failure to investigate and present such mitigation evidence is found to violate the defendant's fundamental right to the assistance of counsel. Although this Court has addressed in several cases counsel's obligations to conduct a full investigation of potential mitigation evidence, the Court has not addressed as extensively how courts should determine whether counsel's failure to do so creates a "reasonable probability" that the outcome of the proceeding would have been different.

For these reasons, petitioner respectfully requests that the Court grant this petition for certiorari.

B. Factual Background

1. West's Childhood

West's mother gave birth to him in a mental institution; she had been placed there after she tried to commit suicide. 6th Cir. JA at 1883-84. His father was a lifelong alcoholic and a violent man who openly questioned West's paternity. Pet. App. 407a.

Under the care of these parents, West's childhood was cruel and traumatizing. Both his mother and his father brutalized him from the time he was a

baby. 6th Cir. JA at 329, 1954-55. His mother would beat him mercilessly by "[s]winging a belt so long and so hard that it would wear her out." *Id.* at 1955. She hit him with shoes and struck him so hard that he became cross-eyed. The beatings left West with "[b]ruises, black eyes, busted lips, pulled hair, pinch marks." *Id.* They were never predictable and occurred without reason. *Id.*

West's aunt, who lived in an apartment above West's family, witnessed some of this horrible abuse. Specifically, she recalled that West's mother swore at him, beat him, threw him against the wall by his feet, and would leave him in a cold room on a mattress wet with urine. His aunt explained: "She was always hitting him. He had bruises on him; pinching him; sling him back in that room if he came out." 6th Cir. JA at 1990.

She also vividly described one example of the kind of abuse that West regularly suffered:

> I came down. Patty [West's sister] came out to get some food for Steve and she [West's mother] started swearing at them and she ran in there and just slung Steve up against the wall; grabbed him by his feet. There was blood and he started throwing up. And she said, "I feel like killing the little bastard." She walked out. I cleaned them up and took them to the hospital. His nose was bleeding and his mouth was bleeding.

6th Cir. JA at 1989-90.

West's oldest sister, Debra, remembers him being slapped in the head and hit with shoes throughout his childhood. Pet. App. 407a. She portrayed him as

the family scapegoat: "If my other brother did something wrong, Steve got beat for it. My sister and I would try to get between them, and we would get beat, and then his beating was finished, and this was not just one or two times. This was from the time I can remember Steve coming home from the hospital." 6th Cir. JA at 1886. Debra described their father as an alcoholic who was violent when sober and even more violent when drinking. *Id.* at 1886-87. Like West's aunt, Debra remembered at least one occasion when West's mother threw him against a wall to punish him. Pet. App. 407a.

The abuse was so merciless that neither West nor his sister, Patricia, has any recollection of the first decade of their lives. West's mother eventually told him that during that period his ankles were broken at least seven times and he also suffered broken toes and a fractured elbow. 6th Cir. JA at 414.

In response to this abuse, West never became violent or fought back. Debra explained that West would "duck" when either of his parents raised a hand near him. 6th Cir. JA at 1887. His aunt said:

> He was very timid. He never said anything. He would just cry. If he saw her coming towards him he'd scream out and start crying and just stand there and let her beat him. A few occasions I asked her, "Please why are you doing this?" She said, "If I could kill him and get away with it I would."

Id. at 1990.

All of this evidence adds up to a compelling mitigation case under this Court's precedents. As explained below, however, West's counsel never

investigated these issues prior to sentencing, and the jury that sentenced West to death never heard any of this evidence.

2. The Crime

In 1980, West escaped his home at the age of seventeen by joining the Army. While in the Army, West's alcohol and drug problem, which began during his early teens, intensified. Regardless, he served honorably and was discharged in 1983. After leaving the Army, West married his wife, Karen, who was pregnant with their first child at the time of the crimes at issue in this case. He also met his co-defendant, seventeen-year-old Ronnie Martin ("Martin"). Prior to this case, West had no criminal record.

In the early hours of March 17, 1986, West and Martin left their work at a McDonald's in Lake City, Tennessee and, many hours later, arrived at and were admitted into the Romines household in Union County, Tennessee. Martin was an acquaintance of fifteen-year-old Sheila Romines. Sometime between the hours of 6 a.m. and 8:30 a.m., Sheila and her mother, Wanda, were stabbed to death. Sheila had been raped before she was killed. *State v. West*, 767 S.W.2d 387, 389-90 (Tenn. 1989). Martin and West were arrested the next day. The trials were severed, and the trial against West proceeded first.

3. Trial Proceedings

Two attorneys represented West: Richard McConnell and Thomas McAlexander. West's parents had hired McConnell, who had no experience in capital cases, to represent West. McAlexander,

court-appointed co-counsel, also had no capital experience. 6th Cir. JA at 1872-73, 1966-67.

The key issue at West's trial was his level of involvement in the murders and his susceptibility to manipulation by Martin, a more dominant personality. There was no question that West had accompanied Martin into the Romines home and that he was there with Martin at the time of the crimes; evidence also showed that West was involved in the rape of Sheila Romines. However, West testified during the guilt phase that it was Martin who had "stabbed and killed" the two women. 6th Cir. JA at 1717. West testified that Martin threatened West with a gun and said that he would kill West and West's wife if he told anyone what had happened inside the Romines home. The prosecution introduced prior statements that West had made in which West described Martin stabbing Sheila Romines; West recounted that when the victim asked Martin why, Martin replied, "I owe you, I owe you." *Id.* at 1731-32.

West's attorneys sought to introduce two taped jailhouse conversations demonstrating that Martin was the main perpetrator and that Martin, not West, had killed Wanda and Sheila Romines. On these tapes, Martin told his cellmate that he had killed both women.[1] The trial court excluded this evidence.

West's attorneys also sought to present testimony from Libby Woods, an acquaintance of both Martin and Sheila Romines. Woods was prepared to testify that Martin had said he would kill Sheila; that he

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[1] The Sixth Circuit transcribed the tapes in its opinion. Pet. App. 27a-28a.

was upset with her for striking and embarrassing him in front of some other students at school; that he wanted to date and have sex with her and she resisted his advances; and that Martin had said that he owed her, and that is why he would kill her. 6th Cir. JA at 1739. The trial court would not allow this testimony.

The prosecution focused heavily on portraying West and his legal team as liars. During closing argument, the prosecutor argued on eleven separate occasions that defense counsel were attempting to mislead or deceive the jury by "blowing smoke" or "throwing sand" in jurors' eyes. The prosecutor also repeatedly called West a liar and made several inflammatory statements not supported by the evidence. 6th Cir. JA at 1761 ("He said that Ronnie took the knife and killed both women. We know that that is a lie. We know that that is a lie. . . . That's a lie. That's a lie. . . . That's a lie.").

The jury found West guilty of two counts of murder, one count of aggravated rape, two counts of aggravated kidnapping, and one count of grand larceny. *State v. West*, 767 S.W.2d at 389, 403.

During sentencing, the prosecutor relied mostly on the evidence presented at trial and again called West a liar and a coward. He also improperly told the jurors that they should not feel responsible about opting for the death penalty because they "did not set punishment in this case, per se." 6th Cir. JA 1811. "[T]he law . . . is self-executing," he said, "in the sense that the law mandates, requires a death sentence in certain situations, unless it is outweighed by other factors." *Id.* at 1810.

West's attorneys put on minimal mitigation evidence; their entire mitigation case consumed only twenty pages of transcript. Such a short case is not surprising in light of how little investigation West's counsel did. Despite the fact that counsel knew West had no memory of the first ten years of his life, as well as the presence of several other red flags, counsel did not seek to interview family members about potential abuse, concluding that doing so would have been a waste of time. McAlexander, who spent *four hours* preparing for sentencing, spoke with West's parents and said "it was like running into a brick wall." 6th Cir. JA at 1715. McAlexander did not seek to investigate further, despite the parents' lack of cooperation. West's sister, Debra, later testified that she told counsel West had been subject to terrible abuse. Counsel, she testified, told her it was not relevant.[2]

In short, West's counsel did not investigate or present to the jury *any* of the evidence about West's brutal childhood that is recounted above. West's attorneys called no one to testify on the subject of the abuse, and the jury never heard any evidence

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[2] Dr. Ben Bursten, a mental-health expert tasked with exploring West's competency and a possible insanity defense, also did not discover West's childhood abuse. He spent only two or three hours with West and never asked West's family – who had hired him – any questions about abuse, despite knowing that West's father was an alcoholic. 6th Cir. JA at 1914, 1931. He omitted any such questioning because "[t]hey created such a picture of a close family." *Id.* at 1915. Asking them questions about abuse would have been "outrageous" in Dr. Bursten's opinion because "[y]ou have to be a little sensitive about the people you are talking to." *Id.*

touching on it. Ultimately, West's mitigation case (including testimony from West himself) emphasized that West had no behavior issues in jail, was a good husband and father, had been an honor student in school, and had no prior criminal record.

West's counsel presented no explanation for why West would have behaved passively and been dominated by Martin during the crimes. Yet his counsel argued that if the jury believed West actually committed the murders, it should send him to the electric chair with counsel's blessing. 6th Cir. JA at 1773. The jury sentenced West to death.

The Tennessee courts affirmed West's direct appeals, despite concluding that the prosecutor's closing argument was improper. *State v. West*, 767 S.W.2d at 399-400.

4. State Post-Conviction Proceedings

In 1990, West filed a petition for post-conviction relief with the state court, arguing that his attorneys were ineffective during sentencing because they should have discovered and presented mitigating evidence that might have convinced the jury to spare his life. The post-conviction court held evidentiary hearings that revealed that, prior to sentencing, West's counsel were aware of a number of facts that should have caused them to investigate the circumstances of West's childhood more closely.

For example, Paul Morrow, a post-conviction legal expert, testified that counsel's awareness that West's severe drug and alcohol problems were noted in Army records would have led reasonable counsel to look further into West's background. Post-Conviction Hr'g Tr. 408 (Oct. 22, 1996). Morrow also

testified that West's statement that he was present at the time of the crime and could not do anything to stop Martin was a red flag signaling that counsel should do a more thorough investigation into West's background and psychological makeup. *Id.* at 410. Finally, the fact that West had virtually no childhood memories before the age of ten was an indication of possible abuse. 6th Cir. JA at 1857-58.

Regardless of these red flags, McConnell and McAlexander readily admitted that prior to West's sentencing they did not conduct a probing investigation into West's background or into any issues of abuse within his family. McConnell testified that family members failed to come forward on the issue of abuse. McAlexander was not "entirely sure about [any allegations of] physical abuse, but if they were mentioned, there was nothing that created any kind of red flag in my mind about that being a factor that should have been inquired into." 6th Cir. JA at 1869. McConnell believed such an investigation "would have been chasing down blind alleys." *Id.* at 1971-72. With respect to conducting separate interviews of siblings and other family members outside the presence of West's parents in order to explore mitigation themes, counsel "certainly wouldn't have wasted time on that." *Id.* at 1955, 1971. Trial counsel also did not obtain West's school, employment, or medical records. *Id.* at 1969-70. Counsel agreed, however, that if they had an "inkling that there may have been a childhood problem" or mental problem, they "would have been obligated to" present that information at sentencing. *Id.* at 1977, 1983-84; Post-Conviction Hr'g Tr. 267.

Instead of investigating West's background for possible abuse, West's attorneys laid the burden of bringing up this sensitive subject on West and his family: "Mr. West never raised any physical . . . or sexual abuse or anything of this nature." Post-Conviction Hr'g Tr. 267. But the evidence was readily available if counsel had sought it out. West's sister Patricia testified during the post-conviction proceeding that she did not tell the attorneys about West's background of abuse because "[n]obody asked and I didn't think it would matter." 6th Cir. JA at 1957. And his sister Debra testified that she informed McConnell about West's history of abuse and that McConnell told her it was not relevant and that because West's parents were paying his fee, he would not raise it. *Id.* at 1888.[3] Other potential witnesses, including West's aunt, were simply never contacted. *Id.* at 1991.

In the post-conviction proceeding, West also presented testimony from Dr. Eric Engum, a clinical psychologist who diagnosed West as suffering from significant depression, longstanding in nature. Dr. Engum's findings of depression were so pronounced that he warned of the possibility of suicide several times in his report to the post-conviction court. He also concluded that West suffered from a severe mixed personality disorder. According to Dr. Engum, West is submissive and operates at the emotional level of a thirteen- to fifteen-year-old. 6th Cir. JA at 1834. The results of West's testing were consistent with those of an individual who had suffered from severe childhood abuse.

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[3] McConnell denied the conversation. 6th Cir. JA at 1983.

Testimony such as that presented by Dr. Engum could have been used at trial to provide an explanation for how West could stand by passively as Martin stabbed both victims. Dr. Engum concluded that "[u]nder extreme levels of stress . . . West may, in fact, experience brief temporary psychotic breaks." 6th Cir. JA at 425. West rated very low on psychological dominance testing, *id.* at 1834-35, supporting the theory that he was dominated by his co-defendant and acting under duress at the time of the offense, *id.* at 1860, as well as suffering from extreme emotional disturbance. *Id.* at 1850-51. Thus, evidence was available that while the crimes were being committed, West was "in an extreme situation, and he became essentially dysfunctional during that time." *Id.* at 1851.[4]

Post-conviction legal expert Morrow testified that this information would have explained West's actions during the crime. It would have fit hand-in-glove with trial counsel's theory of the case:

> [T]here is in this case a series of statements that Steve West gives that are reasonably incomprehensible unless you have the psychological background. His statement that a juvenile dominated him sounds on the surface incredible; his actions on that day of being dominated or not participating. Why didn't he run out the door? Why did he act the

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[4] Dr. Engum noted that in describing the events at the Romines' house, West told Dr. Bursten about experiencing intense fear, helplessness, and horror. He had tears in his eyes and was shaking. He told Dr. Bursten that he felt dazed and detached from his body and felt as if the events were "unreal." 6th Cir. JA at 1852, 1946-48.

> way he did? I'm sure that runs through jurors' minds. Is this person credible? Would a reasonable person act that way? You can't determine that in the abstract. If you know his psychological profile, his background as Dr. Engum spelled it out, there is a reason why he would have behaved that way.

6th Cir. JA at 1988. This evidence would have provided, for the first time, some explanation for why West stood by and did nothing during the murders.

Although this previously undiscovered evidence constituted a compelling case for a jury to spare West's life, the state habeas court denied relief. It recognized counsel's failure to investigate any issues of childhood abuse, explicitly finding that "[n]one [of West's family members] w[as] questioned concerning possible abuse." Pet. App. 420a. But the court denied relief on the ground that West had failed to prove *by a preponderance of the evidence* that the result of his trial would have been different had the newly discovered mitigating evidence been presented to the jury. *Id.*[5] That burden of proof is incorrect – indeed, it is the very same burden that this Court specifically has identified as "contrary to" *Strickland*. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) ("If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in

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[5] The state court focused on the absence of prejudice and made no finding that counsel's performance was adequate.

character or nature' and 'mutually opposed' to our clearly established precedent."). The Court of Criminal Appeals of Tennessee failed to correct the misstated burden of proof – indeed, that court failed even to apply *Strickland*'s two-part test for evaluating ineffective assistance claims. Pet. App. 419a-422a.

5. Federal Habeas Proceedings

On February 20, 2001, West filed a federal habeas petition. On September 30, 2004, the District Court dismissed West's petition. In doing so, the court declined to consider certain evidence that West had submitted – consisting primarily of additional, corroborating expert opinions – on the ground that West had failed to present that mitigation evidence to the state post-conviction court. *See* 28 U.S.C. § 2254(e)(2); Pet. App. 181a-182a.[6]

West then appealed to the Sixth Circuit. In affirming the decision below, the Court of Appeals recognized that the state court decision applied an incorrect burden of proof under *Strickland* and therefore was contrary to clearly established federal law. Pet. App.16a-17a. Nevertheless, the panel held that the state court reached the correct result. In examining the performance of West's trial counsel, the panel disposed of counsel's failure to investigate West's brutal childhood by concluding that counsel "did a fair amount of investigation," Pet. App. 23a, and by citing *Burger v. Kemp*, 483 U.S. 775 (1987), for the proposition that counsel's decision "not to

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[6] Although in petitioner's view this ruling was in error, petitioner does not rely on that contested evidence in this petition.

mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment," Pet. App. 22a. In addition, the Sixth Circuit ruled that even if West could prove that his counsel were ineffective, he had not shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Pet. App. 25a (quoting *Strickland*, 466 U.S. at 694).

In considering whether West had shown prejudice, the panel inexplicably determined – without citation of any authority or support – that evidence of the severe abuse West had suffered as a child might have been considered to be aggravating rather than mitigating, as the jury "might have believed that violence begets violence" and "might have despised West and sentenced him to death with greater zeal." Pet. App. 26a. On the basis of these "might haves," the court said that it could only "speculate" that the jury would have viewed the evidence as mitigating rather than aggravating. *Id.* The court concluded: "There must be 'a reasonable probability' that the proceeding would have been different. Given the strength of the evidence against West presented at trial and the weakness of the mitigating evidence that West presented during the post-conviction proceedings, we cannot conclude that there was a reasonable probability that the jury would have chosen to spare West's life." *Id.*[7]

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[7] The court did not explain its reference to the "weakness" of the mitigating evidence, but this statement followed immediately from its assertion that the jury might have "despised" West on

Judge Karen Nelson Moore dissented, explaining that the majority applied an outdated standard for assessing whether counsel was ineffective. Pet. App. 52a-54a. In Judge Moore's view, under *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), West had established that his counsel were deficient in ignoring "key pieces of evidence" of childhood abuse that "would have led a reasonable attorney to investigate further." Pet. App. 55a. Judge Moore also found that West was prejudiced by this deficiency, concluding that it was "extremely likely" that based on the undiscovered evidence at least one juror would have found the death penalty unwarranted. *Id.* Judge Moore explained that the majority's holding that this evidence could have been aggravating and did not undermine confidence in the reliability of West's sentencing simply "flies in the face" of this Court's decision in *Rompilla*. Pet. App. 57a. Judge Moore would have granted a conditional writ of habeas corpus with respect to the penalty phase. Pet. App. 58a.

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the ground that "violence begets violence" and the court could only "speculate" whether the evidence of childhood abuse would have had a mitigating effect on the jury.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION TO REVIEW THE SIXTH CIRCUIT'S DISMISSAL OF THE SIGNIFICANCE OF EVIDENCE OF SEVERE CHILDHOOD ABUSE.

The decision in this case is wrong and, if not addressed by the Court, will allow the execution of Stephen West before he has had a full and fair opportunity to present compelling, available evidence why the death penalty is inappropriate in his case. But even more important, the decision raises fundamental questions concerning the nature of mitigation evidence and how a court should evaluate the significance of a failure by counsel to investigate and present available mitigation evidence – questions as to which there is a marked and growing divergence of views in the lower courts.

The first issue in any case challenging the effectiveness of counsel is whether counsel's performance was deficient. *Strickland*, 466 U.S. at 687. In this case, however, the Sixth Circuit's view of the significance of the childhood abuse evidence at issue – which the court addressed in its analysis of the "prejudice" prong of *Strickland* – is integral to its evaluation of whether counsel's undisputed failure to investigate and present that evidence constituted deficient performance. As a result, it is essential to review this Court's precedents regarding the nature and significance of mitigating evidence, to compare the standards articulated in those cases to the Sixth Circuit's view of the significance of West's severe childhood abuse, and to compare how other lower

courts have assessed the significance of counsel's failure to present available mitigating evidence.[8]

A. In Upholding The Constitutionality Of The Death Penalty, This Court Has Emphasized The Critical Role Of Mitigation Evidence.

This Court has made clear that the presentation of mitigating evidence during a capital sentencing proceeding is absolutely essential to ensure that a defendant's sentence is adequately reliable – which is of particular concern where the sentence is death. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (explaining that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). Indeed, this Court has explained that it is because of

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[8] The Sixth Circuit noted that § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") permitted it to grant West's petition only if the original or subsequent state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Pet App. 20a. Because, as the Sixth Circuit concluded, the state courts' analysis of *Strickland*'s prejudice prong was plainly contrary to clearly established federal law, *id.* at 19a-20a, and the state courts did not address the deficient performance prong, the Sixth Circuit properly proceeded unencumbered by the state courts' analysis, as may this Court. *See id.*; *Williams v. Taylor*, 529 U.S. 362, 388-89, (2000) (explaining that the state court decision at issue was unreasonable because it "mischaracterized at best the appropriate rule, made clear by this Court in *Strickland*, for determining whether counsel's assistance was effective within the meaning of the Constitution").

"the need for reliability in the determination that death is the appropriate punishment" that the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *see also Roberts v. Louisiana*, 431 U.S. 633, 637 (1977); *Jurek v. Texas*, 428 U.S. 262, 271-74 (1976); *Gregg v. Georgia*, 428 U.S. 153, 189-90 & n.38 (1976).

Such evidence is relevant because it explains the defendant and his actions for the jury – it creates a complete picture of a flawed and complicated human being, to which the jury, in all of its complex humanity, can react. Thus, deeply embedded in this Court's jurisprudence is the principle that "punishment should be directly related to the personal culpability of the criminal defendant" and that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *see also, e.g., Lockett*, 438 U.S. at 604 (explaining that mitigation evidence is any evidence that might serve "as a basis for a sentence less than death"). Any other process necessarily "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members

of a faceless, undifferentiated mass." *Woodson*, 428 U.S. at 304.[9]

The prejudice analysis in this Court's Sixth Amendment cases reflects this understanding of the nature and purpose of mitigation evidence, and gives force to "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). Thus, in a series of cases, this Court has held that evidence showing that the defendant was subject to severe abuse as a child is mitigating, and that counsel's failure to introduce it at sentencing has a prejudicial effect by decreasing the reliability of the proceeding. *See Strickland*, 428 U.S. at 305 (explaining that counsel's assistance is ineffective where it deprives the defendant of "a trial whose result is reliable"). Such evidence humanizes and

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[9] *See also, e.g., McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (explaining that mitigating evidence permits jurors, who "bring to their deliberations qualities of human nature and varieties of human experience," to "focus their collective judgment on the unique characteristics of a particular criminal defendant," and to "make the difficult and uniquely human judgments that defy codification and that buil[d] discretion, equity, and flexibility into a legal system" (internal quotation marks omitted; bracketed in original)); *Eddings v. Oklahoma*, 455 U.S. 104, 110-13 (1982) (explaining that requiring consideration of mitigating evidence "is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual" and evinces a recognition that "a consistency produced by ignoring individual differences is a false consistency").

gives context – it shows that the person whom the jury already has decided is a killer is less blameworthy for his actions because of what others did to him when he was innocent and vulnerable.

For this reason, this Court found prejudice under the *Strickland* test in *Williams v. Taylor*, 529 U.S. 362 (2000), where trial counsel failed to uncover and present to the sentencing jury the "graphic description of Williams' childhood, filled with abuse and privation" as well as evidence of defendant's borderline mental retardation. *Id.* at 398. Such evidence "might well have influenced the jury's appraisal of his moral culpability." *Id.* In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court also found prejudice, explaining that "Wiggins experienced severe privation and abuse in the first six years of his life" and "has the kind of troubled history [that the Court has] declared relevant to assessing a defendant's moral culpability" – so that if this evidence had been placed "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 535, 537. In *Rompilla v. Beard*, 545 U.S. 374 (2005), the defendant suffered abuse as a child, was isolated and "lived in terror," and witnessed violence between his parents; this Court found that "[t]his evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of

[Rompilla's] culpability." 545 U.S. at 393 (internal quotation marks omitted; second bracket in original).[10]

B. The Sixth Circuit Trivialized The Significance Of Severe Childhood Abuse By Hypothesizing, Without Support, That The Jury Might Have Determined That "Violence Begets Violence" or "Despised" West Because Of His Abuse.

The Sixth Circuit's reasoning in this case cannot be squared with this Court's decisions concerning the relevance and importance of mitigating evidence, and particularly evidence concerning a defendant's abusive or deprived childhood. Here, and in every capital case, the jury did not even reach the question of sentencing until it had found that the defendant was guilty of a murder for which a sentence of death was potentially appropriate. The jury had *rejected* West's testimony that he was present but had no involvement in the crimes. As this Court repeatedly has recognized, the issue at sentencing was not *whether* West had played some role in these violent offenses, but *why* he had done so, why he had not stopped them or run away, and whether there was any evidence that might have influenced the jury's appraisal of his moral culpability.

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[10] *See also, e.g., Eddings*, 455 U.S. at 110, 113-15 & n.9 (concluding that evidence of Eddings' childhood, including "excessive physical punishment," was relevant mitigating evidence that the sentencer was required to consider under the Eighth Amendment); *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment) (evidence concerning a defendant's "emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment").

The evidence of the severe depredations West suffered in his abusive and unhappy childhood is the epitome of mitigating evidence under this Court's precedents. As in *Williams*, *Wiggins*, and *Rompilla*, its presentation would have allowed the jury to give force to our society's belief that the defendant was "less culpable" for the crimes because his acts were attributable not to some inherent wickedness but rather to his "disadvantaged background" and his resulting "emotional and mental problems." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring).

The Sixth Circuit's dismissal of the significance of this mitigating evidence is flatly wrong for at least two reasons. First, there is simply no basis for the court's conjectures that the jury "might have" found West's victimization as a child at the hands of his parents to be *aggravating* on a theory that "violence begets violence" or that, because of this evidence, the jury "might have despised West and sentenced him to death with greater zeal." Pet. App. 26a. It simply defies logic and comprehension that any juror would have "despised" West with "greater zeal" because he was thrown against a wall by his mother when he was blameless and unable to defend himself. These "might have" conjectures of the Sixth Circuit are irreconcilable with everything this Court has written about the significance of mitigation evidence of this sort.

Second, the Sixth Circuit has misapplied this Court's precedents regarding the evaluation of prejudice resulting from counsel's failure to present mitigating evidence. Although the Court of Appeals explicitly recognized that "[t]he jury might have believed that the abuse made West the kind of

person who was psychologically unable to confront or disobey strong, threatening people such as Martin" and "might have pitied West and chosen to spare his life," Pet. App. 25a-26a, it found that this was not enough, solely because the court could conjure *other* conclusions that the jury "might have" reached. But this Court has never suggested that to prove prejudice a defendant must show that there is no adverse inference of any kind that conceivably might be drawn from the evidence. Indeed, a defendant need not even show "that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. Rather, a defendant only need show "a reasonable probability" that the outcome would have been different, which is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. As this Court held in *Rompilla*, "it is possible that a jury could have heard it all and still have decided on the death penalty," but "that is not the test." 545 U.S. at 393. And yet that is precisely the basis on which the Sixth Circuit rejected West's claim here. Because it hypothesized that the jury "might have" found the evidence to be aggravating and still sentenced West to death, it held that West had not established prejudice. Pet. App. 25a-26a.[11]

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[11] The court repeatedly posited what "the jury" might do, Pet. App. 25a-26a – but a reasonable probability that even a *single* juror would have changed his or her mind is sufficient to show prejudice. *Wiggins*, 539 U.S. at 537-38. It is inconceivable that not one person out of twelve would have viewed the evidence of West's severe childhood abuse as mitigating, rather than aggravating.

These errors alone, in a case of this nature, warrant this Court's review. However, there is a broader issue presented by this case, concerning the proper method of review of a failure by trial counsel to present so-called "double-edged" mitigation evidence, about which the lower courts are wildly inconsistent.

C. There Is A Wide Divergence Among The Lower Courts Concerning The Nature Of Mitigation Evidence And The Significance Of A Failure To Present It.

Even if the Sixth Circuit were correct that the evidence of West's severe abuse as a child somehow had an aggravating "edge," the Sixth Circuit's treatment of such evidence deepens a split among lower courts. Here, the Sixth Circuit gave what it treated as "double-edged" mitigating evidence essentially no weight in the *Strickland* prejudice analysis. In so ruling, the court joined several other courts that have discounted counsel's failure to present mitigating evidence on this basis.

Thus, the Fourth Circuit has held that in conducting a *Strickland* prejudice analysis, "mitigating evidence . . . should be discounted, under our precedent," if "double-edged." *Bowie*, 512 F.3d at 121; *see also, e.g.*, *Yarbrough v. Johnson*, 520 F.3d 329, 343 (4th Cir. 2008). The Fifth Circuit has done the same. *See Harris*, 313 F.3d at 244 ("The failure to present such double-edged evidence is not prejudicial."). So has the Supreme Court of Florida. *See Willacy*, 967 So. 2d at 144 ("An ineffective assistance claim does not arise from the failure to

present mitigation evidence where that evidence presents a double-edged sword.").

Other courts have recognized that, by its nature, mitigation evidence often *is* "double-edged," and that this is precisely the point of the evidence – it may *explain* why a defendant engaged in the violent act the jury already has found, or show that the defendant is a troubled or disturbed person, rather than a cold-blooded killer. Thus, by definition, the evidence may suggest that the defendant could engage in a violent act or fail to prevent one from occurring.

For example, in *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004), the Tenth Circuit found prejudice resulting from counsel's failure to present mitigation evidence and held that the district court's refusal to give weight to "double-edged" evidence of brain damage and an abusive childhood – on the ground that it suggested the defendant was "an unstable individual with very little control" over his actions – "reveal[ed] a fundamental misunderstanding of the purpose for which such mitigation evidence would have been presented." *Id.* at 943. As the court explained, "[t]he jury already had evidence of Mr. Smith's impulsiveness and lack of emotional control. What the jury wholly lacked was an *explanation* of how Mr. Smith's organic brain damage caused these outbursts of violence and caused this 'kind hearted' person to commit such a shocking crime." *Id.* (footnote omitted).

Similarly, in *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002), the Eighth Circuit rejected an argument that counsel's failure to present evidence

of the abuse the defendant had suffered as a child was not prejudicial because the evidence could have an aggravating effect, reasoning that "[b]y the time the state was finished with its case, the jury's perception of Simmons could not have been more unpleasant. Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. . . . The jury had already convicted Simmons of murdering McClendon, and we fail to see how disclosures of childhood transgressions would have caused any significant harm." *Id.* at 938-39 & n.6.

Other courts have reached similar results, all directly contrary to the analysis of the Sixth Circuit here. *See, e.g., Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir.) ("Boyde's history of suffering violent physical abuse, as well as the family history of sexual abuse he had known about growing up, is the sort of evidence that could persuade a jury to be lenient."), *amended on reh'g*, 421 F.3d 1154 (9th Cir. 2005); *Outten v. Kearney*, 464 F.3d 401, 423 (3d Cir. 2006) (disapproving a state court's conclusion that the defendant "could not establish prejudice because [his] records contained some harmful information" and because the "mitigating and aggravating information . . . cancel[ed] each other out" (internal quotation marks omitted)); *Turpin v. Lipham*, 510 S.E.2d 32, 39, 42-44 (Ga. 1998) (upholding a finding of prejudice because the defendant's "mental disorders and the abuse, neglect and isolation he experienced as a child were not adequately presented to the jurors," even though trial counsel characterized the evidence as "a loaded gun" that could cause the jury to view Lipham as either a

"poor, institutionalized soul from a neglected background or . . . an outright sociopath who only did things for his immediate gratification").

This divergence in approach has extremely serious implications for the fair and uniform administration of justice, since the very same facts could give rise to a finding of prejudice in many courts (such as the Third, Eighth, Ninth, and Tenth Circuits and the Supreme Court of Georgia), while leading to an inability to prove prejudice in many others (such as the Fourth, Fifth, and now Sixth Circuits, as well as the Supreme Court of Florida). Indeed, if this very case had been decided by a court on the other side of the divide, the outcome would have been different. It is clear that even if the evidence of West's terror-filled childhood somehow were viewed as aggravating beacuse "violence begets violence," a weighing of all of the evidence – including the *mitigating* value of this same evidence – would have provided a sufficient basis for relief in many other courts.

This Court should grant review to resolve this issue. To be sure, this Court already has stated that some aggravating "edge" is not enough to disregard the evidence in the prejudice analysis under *Strickland*. In *Williams*, the Court noted that "not all of the additional evidence" of Williams' childhood "was favorable to Williams," since he had committed a number of crimes as a juvenile. *Williams*, 529 U.S. at 396; *see also id.* at 418-19 (Rehnquist, C.J., dissenting). But the Court nevertheless found prejudice based on the mitigating evidence of childhood suffering that the sentencing jury never heard. *See id.* at 393-96. Further guidance from this

Court is plainly necessary, however, as the deepening divide evidenced by the Sixth Circuit's decision here amply illustrates.

D. The Sixth Circuit's Analysis Of Whether Counsel's Performance Was Deficient Was Infected By Its Erroneous View Of The Insignificance Of Childhood Abuse And Is Inconsistent With Decisions Of This Court.

In ruling on whether counsel were deficient in failing to investigate and discover crucial mitigating evidence about West's turbulent childhood, the Sixth Circuit inexplicably failed to apply this Court's recent decisions governing that issue: *Williams*, *Wiggins*, and *Rompilla*. Instead, the court cited to *United States v. Cronic*, 466 U.S. 648 (1984), and *Burger v. Kemp*, 483 U.S. 776 (1987), cases from over twenty years ago that no longer reflect the state of the law on the extent of counsel's duty to investigate mitigating evidence under the Sixth Amendment. In addition, the court's view of counsel's obligation was inevitably colored by its mistaken belief that the evidence overlooked by counsel in this case was by its nature weak and insignificant.

The law is clear: this Court repeatedly has held that counsel has an obligation to conduct a reasonable investigation into potential mitigating evidence and may not simply rely on what the defendant and his family report, or – as the Sixth Circuit suggested was sufficient here – simply interview "all potential witnesses who [are] called to his attention." Pet App. 22a (quoting *Burger*, 483 U.S. at 794-95) (internal quotation marks omitted);

see Rompilla, 545 U.S. at 389-90. Rather, in assessing the reasonableness of an investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Where "counsel [chooses] to abandon their investigation at an unreasonable juncture," a "fully informed decision with respect to sentencing strategy" is "impossible." *Id.* at 527-28.

Here, counsel failed to pursue obvious red flags, such as the fact that West had no memories of the first ten years of his life, had a history of alcohol abuse, and reacted with physical manifestations of fear and anxiety when describing Martin's commission of the crimes. The Sixth Circuit cavalierly dismissed counsel's failure to follow up on these signals and made no reference to the American Bar Association Standards for Criminal Justice, which *Wiggins* emphasized. *Id.* at 523. Instead, the Sixth Circuit asserted that counsel "did a fair amount of investigation in preparation for the mitigation phase," that it was contested whether West's sister had informed counsel of the abuse, and that Dr. Bursten (who carried out a two-hour competency evaluation and declined to ask West's family any questions about abuse) had not found any problem in West's background.[12] Under this Court's

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[12] The court claimed that *West* was responsible for the lack of additional psychological evaluation before sentencing, because he had objected to submitting to a competency evaluation. But that objection came from West's counsel, not from West, Post-Conviction Hr'g Tr. 203-04, and hardly should count against

rulings that is plainly not the test. Even setting aside whether West's sister told counsel about the abuse, counsel had an obligation to conduct an independent investigation of West's background, rather than rest on the minimal work done here. *See, e.g., Wiggins*, 539 U.S. at 527; Pet. App. 54a-55a (Moore, J., dissenting). There is no dispute that West's trial counsel did not in fact ever discover the substantial mitigation evidence presented at the state habeas hearing – the state habeas court explicitly found that "[n]one [of West's family members] was questioned concerning possible abuse," Pet. App. 420a – and yet that evidence was readily available.

The Sixth Circuit's mistaken approach results from its flawed understanding of what constitutes mitigating evidence. Because the court discounted out of hand the value of the evidence that West's attorneys failed to discover, it is not surprising that the court was unwilling to place much (if any) burden on counsel to unearth and present that evidence. After all, the less valuable the evidence, the less time and energy a reasonable attorney would spend looking for it.

Thus, the issue in this case is whether West is entitled to a new sentencing hearing because of his trial counsel's undisputed failure to investigate and present substantial evidence that West was subjected to severe abuse from the earliest years of his life. This Court already has held that counsel in a capital case has a duty to investigate the

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West in the context of an examination of whether counsel's performance was deficient.

circumstances of the defendant's background, which was not done here. The Sixth Circuit ultimately discarded the significance of the evidence in this case because it hypothesized that a jury might have found it to be aggravating, rather than mitigating. For the reasons set forth above, that decision is both wrong and significant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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